LEE KAM WAH

v.

ASSOCIATED ASIAN SECURITIES PTE. LTD.

HIGH COURT, SINGAPORE
M KARTHIGESU J
[SUIT NO. 27 OF 1985]
21 AUGUST 1991

CONTRACT: *Indemnity clause - Relationship between remisier and member of stock exchange - Intention of parties at time of entering agreement - Whether could include losses of a nature which were not in contemplation of parties at time of entering agreement - Implied warranty as to genuineness of share certificates forming subject matter of loss.*

TORT: *Negligence - Failure to detect errors in transaction - Whether this amounts to failure to detect forgery.*

The plaintiff, L, was a remisier with the defendants, AAS, who were, at the time of the action was commenced, members of the Stock Exchange of Singapore Ltd. L ceased being a remisier with AAS on 31 August 1984 and instituted a claim on 2 January 1985 against AAS for $35,484.13 being monies due to him on his account with AAS. L's claim was not disputed by AAS but they counterclaimed a sum of $161,429.70 being losses suffered by AAS through the sale of certain public listed shares which L, as a remisier for AAS had put through between 1 and 16 September 1983 for one TYK against which the said TYK had delivered scrips which turned out to be fictitious or forgeries. AAS' counterclaim was based on certain terms and conditions of a memorandum in writing governing L's service as a remisier (the said agreement.)

On 5 July 1985 the Registrar ordered judgment to be entered against AAS but stayed execution pending trial of AAS' counterclaim. At the conclusion of the hearing of the counterclaim on 17 July 1991 the Court dismissed AAS' counterclaim with costs. This is their appeal.

The issues were:

(a) whether the indemnity clauses in the said agreement were wide enough to cover fraudulent transactions.

(b) whether there was an implied warranty from the manner in which remisiers put through business of "their clients" through the member firms of the Stock Exchange that the certificates delivered by "their clients" were genuine certificates and not forgeries.

(c) whether AAS had been negligent in failing to detect the forgeries by detecting errors in the transfer forms.

Held:

[1] It would be wrong to give these indemnity clauses such an open-ended construction without trying to ascertain what the parties really intended from the terms of the document in question and the surrounding circumstances at the time the parties entered into the agreement unless the evidence clearly established that the plaintiff was negligent or had been a party to the fraudulent transaction.

[2] It must be presumed unless the contrary is specifically stated that the losses and damages which were in the contemplation of the parties at the time of entering the agreement were only the unforeseen losses and damages that flow from genuine and *bona fide* transactions. Fraudulent transactions such as the sale of forged share certificates could hardly have been in the contemplation of the parties when they entered into the agreement and as such L could not be made liable to AAS on the indemnity clauses in the said agreement.

[3] There was no act, word or deed of the plaintiff from which it could be implied that he had warranted to the defendants that the certificates TYK would deliver were genuine certificates.

[4] AAS had not been negligent in the handling of the transaction. The failure to detect a minor misspelling of a name or the failure to detect a difference in the originating broker's code and the name of the witnessing broker were not acts of negligence resulting in a failure to uncover forgery.

[AAS' counterclaim dismissed with costs.]

Cases referred to:
Canada Steamship Lines Ltd. v. The King [1952] AC 192 ***(cit)***
Yeung and Anor. v. Hong Kong and Shanghai Banking Corporation [1980] 2 All ER 599 ***(dist)***

For the plaintiff - Ng Kai Ming
For the defendants - Bernard Doray with Cynthia Lim

JUDGMENT

M Karthigesu J:

The plaintiff was a remisier with the defendants. At the time when this action was commenced on 2 January 1985, the defendants were members of the Stock Exchange of Singapore Ltd. but when this action came on for hearing on 15 July 1991 they were no longer members having been put into liquidation in September 1987.

The plaintiff ceased being a remisier with the defendants on 31 August 1984 and claimed for monies due to him on his account with the defendants as of that date, which he quantified in the sum of $35,484.13. The defendants did not dispute the plaintiff's claim but counterclaimed a sum of $161,429.70 as being losses suffered by them through the sale of certain public listed shares namely Genting shares, Magnum shares and Promet shares which the plaintiff, as a remisier with the defendants, had put through between 1 and 16 September 1983 for one "Tan Yong Khoon" against which the said "Tan Yong Khoon" had delivered scrips which turned out to be fictitious or forgeries. The defendants also claimed interest on the sum of $161,429.70 at the rate of 1.2% per annum from 20 June 1985 till payment and/or judgment.

The basis of the defendants' counterclaim as pleaded reads as follows:

> The plaintiff agreed, by a memorandum in writing dated 14 September 1981, to abide by the terms and conditions governing his service as a remisier. The said terms and conditions provide, *inter alia*, that:
>
> i. The plaintiff shall be responsible for all liabilities arising from contracts written by the plaintiff.
>
> ii. The plaintiff shall indemnify the defendants for any losses and damages that may arise on all contracts written by the plaintiff.

iii. The plaintiffs shall indemnify the defendants for any losses and damages arising from any contracts written or any transactions entered into by the plaintiff.

The plaintiff's defence to the defendants' counterclaim was that on a proper construction of the terms and conditions relied on by the defendants as aforesaid, he was not liable to the defendants for any loss or damage suffered by them and in the alternative that the defendants were themselves negligent in having accepted the scrips delivered to them by the said "Tan Yong Khoon" pursuant to the sale transactions in question without first assuring their authenticity such that the defendants were debarred in law from relying upon the terms and conditions previously referred to. Numerous particulars of negligence were given to which reference will be made later.

On 5 July 1985 the learned registrar ordered that judgment be entered for the plaintiff for the sum claimed namely $35,484.13 together with interest at 8% per annum from 5 July 1985 until payment and $700 costs and stayed execution pending the trial of the defendants' counterclaim.

At the conclusion of the trial on 17 July 1991 I dismissed the defendants' counterclaim with costs prefacing my decision with the following remarks:

> The question in this case and on which it turns is whether the plaintiff warranted the genuineness of the scrips sold by the person who called himself "Tan Yong Khoon". Such a warranty will have to be implied in the circumstances of this case. I am unable from the facts and evidence given to imply that there was such a warranty. It is this feature which distinguishes this case from *Yeung v. HSBC* (*Yeung & Anor. v. Hong Kong and Shanghai Banking Corporation* [1980] 2 All ER 599) on which the defendants rely.

The defendants have now appealed.

The facts, in the main, are not in dispute. They are that sometime towards the end of August 1983 one Dennis Ng Siong Seng posing as "Tan Yong Khoon" whose identity card he had clandestinely obtained, introduced himself over the telephone to the plaintiff, as being a friend of one of his "clients" namely one Raymond Loh, and had wanted the plaintiff's services in buying and selling shares on the Stock Exchange. The plaintiff agreed to accept "Tan Yong Khoon" as a "client" but before doing so had interviewed him briefly, checked his identity card and got him to fill out a form for the opening of a new account. The first transaction was on 1 September when "Tan Yong Khoon" had purchased 4,000 Genting shares and had paid for them through the defendants' payment counter. Thereafter and up to 16 September "Tan Yong Khoon" had given instructions over the telephone to sell various lots of Promet, Genting and Magnum shares which sale transactions the plaintiff had put through.

The plaintiff explained in cross-examination his mode of the operation. When a client wanted, say, to sell a lot of particular shares he would give the client a quotation and when the client instructed him to sell he would contact one of the defendants' persons on the floor and ask him to sell at the stated price. When he was told that the lot had been sold he would inform the client and fill out the trading form the defendants used and hand it in to the defendants to convert it into a sale note. The client would then deliver the share scrips of the counter sold to the defendants' scrip delivery department. He was required to do this before 12.30 p.m to enable him to receive a cheque for the shares sold from the defendants the next day. If he missed the 12.30 p.m dead line the client would receive the cheque only on the second market day following the sale.

Generally it was the client who would deliver the scrips of the shares sold to the defendants' scrip delivery department. However on rare occasions the plaintiff would do so on behalf of his client but in so far as the shares sold by "Tan Yong Khoon" between 1 and 16 September were concerned the plaintiff maintained that he had not delivered any of them to the defendants' scrip delivery department on behalf of "Tan Yong Khoon". There was no evidence to the contrary. In fact the defendants' witness Alan Pwee Ah Tee (DW3) recalled that he had seen "Tan Yong Khoon" himself deliver share scrips to the defendants' scrip delivery department and what had struck him was that "Tan Yong Khoon" invariably made the deliveries around 12.15 p.m or 12.20 p.m, that is to say just before the dead line of 12.30 p.m. This observation had aroused a suspicion in the mind of Alan Pwee Ah Tee so much so that he had drawn the plaintiff's attention to it and had asked whether "Tan Yong Khoon" was reliable. The plaintiff remembered Alan Pwee Ah Tee talking to him about "Tan Yong Khoon" but according to him only to enquire whether "Tan Yong Khoon" was a new "client" for if he was then the plaintiff ought to be careful in dealing with him. Alan Pwee Ah Tee at the material time was the manager of the defendants' scrip delivery department.

Alan Pwee Ah Tee also recalled that late one evening he had received a telephone call from one Albert Lim, the supervisor at Ong & Co. another stockbroking firm who told him that his signature on a transfer form received by his firm from the securities cleaning computer services and emanating from the defendants had been forged. Immediate investigations were instituted which revealed that the transfer form referred to by Albert Lim had been presented by "Tan Yong Khoon" that day. Alan Pwee Ah Tee could not remember the date of this telephone conversation. It must have been 16 September 1983 because that was the last recorded date on which "Tan Yong Khoon" sold any shares through the plaintiff and or the defendants. Anyhow all payments for the shares sold by "Tan Yong Khoon" were stopped. The plaintiff, Alan Pwee Ah Tee and another staff member of the defendants then lodged police reports as a result of which Dennis Ng Siong Seng who had been posing as "Tan Yong Khoon" was apprehended and prosecuted for dealing in forged share certificates.

There was no doubt that the shares "Tan Yong Khoon" sold through the plaintiff between 1 and 16 September 1983 were all forgeries. The plaintiff accepted this. The plaintiff also accepted that by the Stock Exchange Rules the defendants were obliged to deliver genuine share scrips of the shares sold through them to the buyer. In order to discharge this obligation the defendants had bought the required number of various shares to replace the forged shares "Tan Yong Khoon" had sold through them between 1 and 16 September. This had cost them $161,429.70 but as there was no evidence that the 4,000 Promet shares sold by "Tan Yong Khoon" were forgeries, the defendants limited their claim to $143,707.74.

The figure of $143,707.74 was not in dispute. What was in dispute was the plaintiff's liability to the defendants for this sum. A remisier is licensed by the stock exchange. The relationship of the remisier and the member firm is that of agent and principal. This is provided by the Stock Exchange Rules. Member firms of the stock exchange trade through two classes of persons, namely dealers and remisiers. Dealers are employees of the member firm whereas remisiers are not. They are self employed persons who tie themselves to a member firm by agreement and are remunerated from the official brokerage received by the member firm in respect of all contracts transacted by the remisier in the name of the member firm.

The plaintiff's agreement with the defendants was embodied in a written document dated 14 September 1981 which set out the terms and conditions of the plaintiff's services as a remisier with the defendants. The provisions relied on by the defendants were the following:

Clause 1(viii)

> You (the plaintiff) shall be responsible for all liabilities arising from contracts written by you.

Clause 3(iv)

> You (the plaintiff) shall indemnify the company (the defendants) of any losses and damages that may arise on all contracts written by you.

and a clause at the foot of the document and above the plaintiff's signature which read:

> I (the plaintiff) agree to the above terms and conditions and hereby indemnify the company (the defendants) for any losses or damages arising from any contracts written or any transactions entered into by me.

Defendants' Counsel's first line of argument (which was the pleaded case) was that the indemnity provisions contained in clause 3(iv) and in the clause at the foot of the document date 14 September 1981 were wide enough to cover fraudulent transactions. The defendants had incurred an expense of $143,707.74 which they would not have were it not for the fact that the plaintiff's "client" "Tan Yong Khoon" had delivered forged certificates of the shares he sold which the defendants were obliged to by the Stock Exchange Rules to replace with genuine certificates. It was because of this obligation which the defendants had under the Stock Exchange Rules that an indemnity provision has been included in the terms and conditions of the agreement embodied in the document dated 14 September 1981. Furthermore the defendants had no contract with "the client" "Tan Yong Khoon" except in an administrative capacity. "Tan Yong Khoon" was the plaintiff's "client" and not the defendants'. Accordingly the plaintiff was legally liable to indemnify the defendants the sum of $143,707.74.

Secondly defendants' Counsel argued that from the manner in which remisiers put through the business of "their clients" through the member firms of the stock exchange there was to be implied a warranty that the certificates delivered by "their clients" in a sale were genuine certificates and not forgeries. For this proposition he cited *Yeung & Anr. v. Hong Kong and Shanghai Banking Corp.* [1980] 2 ALL ER 599. Since the plaintiff was in breach of this implied warranty he was legally liable to indemnify the defendants in the sum of $143,707.74.

The wording of the indemnity clauses and the document itself is inelegant. They can mean every conceivable loss or damage. In my view it would be wrong to give these indemnity clauses such an open-ended construction without trying to ascertain what the parties really intended from the terms of the document in question and the surrounding circumstances at the time the parties entered into the agreement unless the evidence clearly established that the plaintiff was negligent or had been a party to the fraudulent transaction. On the evidence I have summarized above I was unable to make any finding that the plaintiff had been negligent in dealing with "Tan Yong Khoon" or in putting through his transactions or that he had been a party to "Tan Yong Khoon's" fraudulent transactions.

The question was what did the parties have in mind when the entered into the agreement. Did they intend it to apply to genuine and bona fide transactions of buying and selling shares on the stock exchange and the unforseen losses and damages that flow from the speculative nature of these transactions or did the parties also have in mind the losses and damages brought about by fraudulent transactions. *Omnia Praesumptur rite esse acta*. It must be presumed unless the contrary is specifically stated that the parties had in mind only

the unforseen losses and damages that flow from genuine and *bona fide* transactions. Sudden and sharp increases or drops in share prices can result in contra losses. Failure to take up shares bought or deliver shares sold could result in the "selling out" or "buying in" procedures being instituted by the broking firm which could result in losses or damages to the broking firm. I have no doubt that it was losses and damages of this kind which can result from genuine and bona fide transaction that were in the contemplation of the parties. It is pertinent to note that two witnesses called by the defendants, Alan Pwee Ah Tee who has been in the securities industry since 1964 and Krishna Kumar (DW4) who was the managing director of the defendants from July 1977 until it was wound up, both said that in their experience fraudulent transactions such as the sale of forged share certificates was virtually unheard of in 1981. This could hardly have been in the contemplation of the parties when they entered into the agreement on 14 September 1981.

Thus I concluded that the plaintiff could not be made liable to the defendants for the sum of $143,707.74 on the indemnity clauses in the agreement.

The second argument of defence Counsel, that of an implied warranty, was not pleaded. However that might be Counsel submitted that in every sale transaction on the Stock Exchange there was to be implied a warranty that there will be good delivery against payment. Delivery of forged certificates was not good delivery. The question was who warranted the good delivery, the genuineness of the certificates delivered. Defence Counsel tried to make out a case for saying that the plaintiff, as the remisier, through whom "Tan Yong Khoon" had put through the sale transactions simply by reason of that had impliedly warranted to the defendants that the certificates "Tan Yong Khoon" would deliver thereto were genuine. Not only was it to be implied that genuine certificates would be delivered by "Tan Yong Khoon" but it was also to be implied that the plaintiff warranted to the defendants that "Tan Yong Khoon" would deliver genuine certificates.

I was quite unable to accept this submission. From the facts as I have recounted them I could not find any act, word or deed of the plaintiff from which I could imply that he had warranted to the defendants that the certificates "Tan Yong Khoon" would deliver were genuine certificates. Unless I could imply such a warranty reliance on the case of *Yeung and Anor. v. Hong Kong and Shanghai Banking Corp.* would be misplaced. The plaintiff had not made any request nor could any request be implied from the facts of this case that the defendants accept the certificates that "Tan Yong Khoon" would deliver pursuant to his contract to sell, albeit transacted through the plaintiff, as genuine certificates and not forgeries.

Yeung and Anor. v. Hong Kong and Shanghai Banking Corp. is clearly distinguishable. It will be seen from that case that the firm of stockbrokers presented certificates to the bank together with duly completed transfer deeds under cover of a letter signed in the firm's name requesting the bank to give effect to the transfer in favour of its client and to issue new certificates in the client's name. The bank acted on that request without checking the transferor's signature with the signature in their books. The Privy Council held that the firm of stockbrokers were liable to the bank on the basis that the stockbrokers' request in their letter amounted to an implied warranty that the documents presented by them were genuine.

Notwithstanding that an implied warranty had not been pleaded but on the basis that I would have allowed an amendment to the pleading had an application been made I held that the plaintiff could not be held liable to the defendants on this ground as well.

Plaintiff's Counsel advanced the further argument that even if the indemnities could be held to cover losses and damages arising from a fraudulent transaction the defendants' claim must still fail since they were negligent in not having detected that the certificates delivered by "Tan Yong Khoon" were forgeries. He relied on the case of *Canada Steamship Lines Ltd. v. The King* [1952] AC 192.

The authority relied on is good authority but I was not persuaded that the plaintiff had proved negligence on the part of the defendants. Two acts of negligence of the several acts of negligence particularized were given in evidence. The first related to the spelling of the name "Ong Tek Gee" which was wrongly spelt "Ong Teck Gee" in the transfer form. The other was that a difference in the "originating broker" and the "witnessing broker" should have alerted the defendants' Scrip Delivery Department that something was amiss and failing to be so alerted was an act of negligence. The "originating broker" is identified by the code letters stamped on the share certificate and merely identifies the first broker handling that particular certificate. The "witnessing broker" is the one who witnesses the transferor's signature. The plaintiff's argument was that when they were different, suspicions were aroused and should be investigated.

I fail to see how the failure to detect a minor mis-spelling of a name or the failure to detect an act on a difference in originating broker's code and the name of the witnessing broker, both of which were not consistently evident in the certificates and transfers delivered by "Tan Yong Khoon" can be said to be acts of negligence resulting in the failure to uncover forgery. Accordingly I placed no reliance on this argument.

For the aforementioned reasons I dismissed with costs the defendants' counterclaim for $143,707.74 and interest thereon at the rate of 1.2% per annum form 20 June 1985 till payment or judgment.

Also found at [1991] 3 CLJ 2697